

Humboldt Watershed Council

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October 30, 2006

PETITION TO THE STATE WATER RESOURCES CONTROL BOARD

Humboldt Watershed Council,

Petitioners,

In the Matter Re: In the Matter Re: Petition for appeal and immediate stay of action by California Regional Water Quality Control Board – North Coast Region, on September 29th, 2006, regarding approval of Monitoring and Reporting Program, Order R1-2006-0103, and enrollment of THPs 1-03-126, 1-04-241 and 1-05-161 under Watershed-wide Waste Discharge Requirements, Order R1-2006-0041, for Pacific Lumber Company timber operations in Freshwater Creek and Elk River watersheds, Humboldt County.

**PETITION FOR
APPEAL AND
IMMEDIATE STAY OF
MONITORING AND
REPORTING, ORDER
R1-2006-0103 AND
SUBSEQUENT THP
ENROLLMENTS
(THPs 1-03-126, 1-04-
241 and 1-05-161)**

Summary

The Humboldt Watershed Council (HWC) hereby petitions for appeal and immediate stay of an improper action by the Executive Officer of the North Coast Regional Water Quality Control Board (NCRWQCB) to approve a Monitoring and Reporting Program (MRP) for Pacific Lumber Company timber operations in the Freshwater Creek and Elk River watersheds in Humboldt County, Order R1-2006-0103, and the subsequent enrollment of THPs 1-03-126 and 1-04-241 (Freshwater Creek), and THP 1-05-161 (Elk River), and/or any other THPs, into that MRP under Watershed-wide Waste Discharge Requirements, Orders R1-2006-0041 and R1-2006-0039.

Approval of this MRP violates both the letter and intent of the North Coast Regional Water Board's May 8th, 2006 motion and its findings, is inconsistent with the Board's previous findings on this issue, is irreconcilable with the Board's stated requirement to allow zero sediment discharge beyond 125% of background, will categorically result in a significant increase in sediment delivery to Freshwater Creek, will subject downstream landowners to further harm, was done without any CEQA review, ignores cumulative impacts, and was done without consideration for or involvement of effected residents who had specifically asked to be apprised of any developing permit.

This issues raised in this petition have also been submitted to the NCRWQCB on October 5th, 2006 as a Request for Reconsideration, pursuant to and in compliance with Paragraph K of the MRP, which reads, in part:

"In addition to filing a petition with the State Water Board, any person affected by this Order may request the Regional Water Board to reconsider this Order. To be timely, such request must be made within 30 days of the date of this order. Note that even if reconsideration by the Regional Water Board is sought, filing a petition with the State Water Board within the 30-day period is necessary to preserve the petitioner's legal rights."

The North Coast Regional Water Quality Control Board has scheduled a hearing on petitioner's request for reconsideration for their November 29th meeting in Santa Rosa, California. The format, criteria and legal requirements for the NCRWQCB to 'reconsider' an action by the Executive Officer are not codified, putting petitioner at an extreme disadvantage in having no way to effectively prepare for this hearing. Additionally, a stay is necessary because the Regional Board is not expected to have a quorum for the hearing on the 29th, and thus petitioner's rights to redress through that avenue cannot be assured. Without a quorum the Board would not be able to provide any direction to the EO. The Humboldt Watershed Council is therefore petitioning the State Water Board for an immediate emergency stay and review of the Executive Officer's improper action.

Petitioner HWC has filed this petition in a timely manner, and in accordance with the rules set forth in Section 13320 of the California Water Code and Title 23 of the California Code of Regulations, Section 2050, so as to preserve our legal rights and to ensure a fair hearing, which may not be possible through the ill-defined process being afforded by the 'Request for Reconsideration.' Petitioner seeks whichever of these two remedies may be speediest, but specifically notes that reconsideration by the NCRWQCB does not obviate our rights to seek review by the State Water Board.

(1) Name, address, telephone number and email address of the petitioner:

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(2) The specific action or inaction of the regional board which the state board is requested to review and a copy of any order or resolution of the regional board which is referred to in the petition:

Petitioner specifically requests an immediate stay and review of action by the Executive Officer of the North Coast Regional Water Quality Control Board on September 29th, 2006, to approve a Monitoring and Reporting Program, Order R1-2006-0103, and subsequent enrollment of THPs 1-03-126, 1-04-241 and 1-05-161, and/or any further THPs under Watershed-wide Waste

Discharge Requirements, orders R1-2006-0041 and R1-2006-0039, for Pacific Lumber Company timber operations in Freshwater Creek and Elk River watersheds, Humboldt County.

This petition does not apply to those THPs permitted under the above WWDRs prior to the approval of the MRP (referred to by Palco as “Tier 1” THPs.)

(3) The date on which the regional board acted or refused to act or on which the regional board was requested to act:

Monitoring and Reporting Program order R1-2006-0103 was approved by the Executive Officer of the North Coast Regional Water Quality Control Board on September 29th, 2006. THP 1-03-126 was enrolled under that MRP on the same date. THP 1-05-161 was enrolled under the MRP on October 13th, and THP 1-04-241 was enrolled on October 17th. The MRP and all subsequent THP enrollments were signed by Luis Rivera, Assistant Executive Officer, at the office of the NCRWQCB in Santa Rosa.

Petitioner understands that there are additional THP enrollments pending, and asks that any further enrollments under the MRP be included in this petition.

(4) A full and complete statement of the reasons the action or failure to act was inappropriate or improper.

Approval of this MRP violates both the letter and intent of the North Coast Regional Water Board's May 8th, 2006 motion and its findings, is inconsistent with the Board's previous findings on this issue, is irreconcilable with the Board's stated requirement to allow zero sediment discharge beyond 125% of background, will categorically result in a significant increase in sediment delivery to Freshwater Creek and Elk River, will subject downstream landowners to further harm, was done without any CEQA review, ignores cumulative impacts, and was done without consideration for or involvement of effected residents who had specifically asked to be apprised of any developing permit.

Approval of the MRP violates the letter and intent of the Board's May 8th, 2006 motion.

The approval of this MRP completely violates the clear and unambiguous wording and intent of the Board's motion from the May 8th, 2006 hearing at which the WWDRs were approved. That motion clearly stated that, once the 125% sediment threshold had been reached, no further sediment discharges would be allowed. The motion did not distinguish between sediment from landslides and sediment from other sources, as the wrongly-approved MRP does. Nowhere in the Board's motion is there any limitation on which sediment sources shall, or shall not, be considered in the “zero discharge” category.

The Board's motion is also quite specifically worded to require that any acceptable monitoring plan must be able to prove that no sediment discharges are occurring. This is vastly different than the language in the wrongly-approved MRP which only seeks to find sediment which “has occurred.”¹ The wording in the Board's motion speaks to prevention, in that an approvable MRP must be able to immediately identify sediment discharges *as they are occurring*.

¹ Monitoring and Reporting Program R1-2006-0103

This is, of course, the only meaningful way to prevent sediment discharges from exceeding the 125% level which has been set as a cap in these watersheds. Monitoring after the fact cannot possibly prevent sediment discharges, and thus it is simply, logically, scientifically and physically impossible for such a system to prevent exceedance of the 125% limit. The MRP as adopted renders the 125% limit meaningless, as it cannot assure that no sediment will be discharged, and can only monitor for sediment after it has been discharged, when it is too late.

At issue are two contradictory and inconsistent versions of the Board's direction on May 8th. The first version is that which was clearly heard and understood by all parties at the May 8th hearing, as evidenced in every available record of that hearing. A transcript of that hearing which was provided by staff following the hearing reads as follows:

"If there should be any inconsistencies, they shall be conformed to this motion. This shall include numbering and renumbering."

"Key provisions

The Board finds the scope of changes are within the CEQA provisions and documents and are found to be adequate."

"Sediment: The Regional Board adopts the staff 125 percent maximum sediment level of 125 percent above the natural background level thereafter the board adopts a 0 sediment discharge level a further condition of zero sediment discharges is that the discharger is required to provide an enforceable monitoring plan acceptable to the executive officer to prove no sediment discharges are occurring."²

The official minutes from the May 8th hearing are consistent with that transcript:

"That in the event of any inconsistencies, the WWDRs and Resolutions be conformed to the motion."

"The Board finds that the scope of changes are within the CEQA provisions and documents and are found to be adequate."

"Sediment: The Regional Board adopts the staff 125 percent maximum sediment level of 125 percent above the natural background level; thereafter the board adopts a zero (0) sediment discharge level. A further condition of zero sediment discharges is that the discharger is required to provide an enforceable monitoring plan acceptable to the Executive Officer to prove no sediment discharges are occurring."³

An additional version of the transcript was provided by RWB Assistant Director Luis Rivera as an attachment to his Request for Rejection of HWC's Petition⁴. That version is also consistent with the above two versions:

"If there should be inconsistencies, they shall be conformed to this motion. This shall include numbering and renumbering."

"Key provisions. The Board finds the scope of changes are within the CEQA provisions and documents and are found to be adequate."

² Excerpt of Unofficial Transcript of Proceedings North Coast Regional Water Quality Control Board Meeting May 8, 2006

³ Minutes of the May 8th, 2006 NCRWQCB meeting, in document titled *May 8 Minutes-ejl-eks*

⁴ Luis G. Rivera, Request for Rejection of HWC's Petition, October 13, 2006

"Sediment. The Regional Board adopts the staff 125 percent maximum sediment level of 125 percent above the natural background level. Thereafter the board adopts a 0 sediment discharge level. A further condition of zero sediment discharges is that the discharger is required to provide an enforceable monitoring plan acceptable to the Executive Officer to prove no sediment discharges are occurring."⁵

Please note that the word "landslides" is nowhere present in either of the transcripts, nor in the minutes. Please also note the phrase **"to prove no sediment discharges are occurring"** appears in all three records.

The minutes for the May 8th hearing were approved unanimously, as presented, at the June 29th meeting. Those minutes are attached⁶. Were this not the correct and accurate wording of the Board's motion, then that would have been the appropriate time to address it or to make a change. Lacking any correction, the wording of the Board's motion stands as stated above. There is no accommodation for any staff, including the Executive Director, to "re-interpret" the Board's wording.

Quite unexplainably, that is precisely what has happened. The wording which appears in the permit which was distributed on May 12th (4 days *after* being approved) reads:

"For Timber Harvesting Plan Activities in excess of the harvest acreage associated with this receiving water limitation, the Regional Water Board adopts a zero discharge effluent standard for sediment from harvest-related landsliding. The Discharger will become eligible to exceed the harvest acreage associated with this receiving water limitation only upon receiving written approval by the Executive Officer of an enforceable monitoring program to prove that no discharge has occurred."⁷

Clearly, this language does not "conform to the motion" as was clearly and unequivocally directed by the Board. Staff arbitrarily inserted wording which was never voiced by the Board, and changed the significant phrase **"to prove no sediment discharges are occurring"** into **"to prove that no discharge has occurred."** There is no explanation for this arbitrary and capricious rewriting of the Board's words, which substantially changes the meaning of those words.

Following on staff's unexplained editing of the Board's words, the MRP was approved with the same flawed, false, and arbitrarily-invented wording:

"In the event that the harvest rate from the Landslide Reduction Model is limiting, the WWDRs do allow the Discharger to exceed that rate (up to the limit specified by the Peak Flow model) provided that there is zero discharge of sediment from harvest –related landslides from the additional harvested acres and that a monitoring program to prove no such discharge has occurred has been approved by the Executive Officer."⁸

People in the room that day heard what was said, and had that corroborated by multiple transcripts and by and the minutes. The interpretation of those documents was also corroborated by direct conversations with various Board members and staff. The approval of an after-the-fact monitoring plan which looks only for sediment from landslides is a gross violation of what any witness to the Board's motion would reasonably have understood.

A memo from Executive Officer Catherine Kuhlman on May 9th, the day after the hearing, was received via e-mail with a note saying **"Here is the way we see it."** That memo included a chart

⁵ Luis G. Rivera, Request for Rejection of HWC's Petition, October 13, 2006

⁶ Minutes of Meeting, June 28 and 29, 2006 Regional Water Board North Coast Region

⁷ North Coast Regional Water Board Order No. R1-2006-0041(Freshwater) and R1-2006-0039 (Elk River.)

⁸ Monitoring and Reporting Program R1-2006-0103

titled "What model governs," showing the acreage that would be allowed under the approved permit, and a note saying:

**Additional acreage is available if there is no sediment discharged and an enforceable monitoring plan is in place, then acreage limits would be capped by the Peak Flow Model.⁹*

Note that the Executive Officer took pains to underline the word no. There are no 'qualifying' words attached.

Petitioner has reason to believe that, in fact, the final document did not even exist at the time that the Board passed its motion on May 8th. Communications received following that hearing suggest that Board Members had no final version in front of them at the time their motion was passed, which would explain why they took the precaution of stating that *"If there should be inconsistencies, they shall be conformed to this motion."* Evidence of this is contained in a pair of e-mails received from Regional Board Staff Counsel Eric Speiss in the days after the hearing. The first, received May 10th reads:

"Many of you are undoubtedly wondering why the final versions of these documents have not yet been circulated. As the Board stated at the close of the meeting on May 8, 2006, the computer versions developed some formatting problems. These are taking some time to straighten out. We also need to make sure that the Resolutions and WWDRs are consistent with the adoption motion. Bottom line: the final versions should be done and signed by tomorrow sometime¹⁰."

The second was received on May 12th, along with the post-adoption versions of the WWDRs. It reads:

"Attached are the adopted Resolutions and Watershed-wide Waste Discharge Requirements for Timber Harvesting Plan Activities by Pacific Lumber Company et al in the Elk River and Freshwater Creek watersheds (Resolution No. R1-2006-0038 and Order No. R1-2006-0039 (Elk River); and Resolution No. R1-2006-0040 and Order No. R1-2006-0041 (Freshwater Creek)".

"We hoped to circulate them sooner, but we had to rectify formatting problems in the computer versions we worked on in closed session and needed to conform the Resolutions and WWDRs to the adoption motion (which is contained in the attached transcript excerpt)¹¹."

Both of these e-mails support the belief that the only version of the final wording which existed at the time of adoption were the words spoken by the Board. Simply put, the Board adopted a permit which existed in verbal form only. The version that was circulated by staff was written post-adoption, and could not logically have been approved by the Board as it did not exist at the time of the hearing.

Interestingly, both of these e-mails raise the issue of 'conforming' the permit to the adoption motion. The transcript of the adoption motion was even included with the e-mail. However, the version of the WWDR written by staff *after* adoption by the Board fails utterly to conform to the clear and unequivocal words of the Board.

⁹ May 9th, 2006 memo from Cat Kuhlman, titled *What model governs*

¹⁰ E-mail from Erik Speiss, May 10th, 2006, titled *PALCO WWDRs - Status of the Resolutions and WWDRs*

¹¹ May 12th, 2006 e-mail from Erik Speiss, titled *PALCO WWDRs - Adopted Resolutions and WWDRs*

Approval of this MRP is inconsistent with the Board's previous findings on this issue.

The resolutions for the WWDRs cast a very skeptical eye on any claims that harvesting activities can be conducted without generating sediment. Resolution 71a states:

"The Regional Water Board is receptive to the possibility that the Discharger's ingenuity may produce a method of performing more extensive harvesting activities and still achieving compliance with the sediment target. Unfortunately, the Regional Water Board is unaware of a monitoring method that will enable compliance to be determined on an ongoing basis. Should the Discharger manage to produce a plan for monitoring compliance with the sediment target as an alternative to the Staff Landslide Model that is acceptable to the Executive Officer, the Discharger may exceed the clearcut equivalent acreage specified by the model so long as compliance with the sediment target is maintained."

By saying that it is "unaware of a monitoring method that will enable compliance to be determined on an ongoing basis" the Board is raising the fundamental issue here. There is a significant and categorical difference between monitoring "to prove no sediment discharges **are occurring**" and monitoring "to prove that no discharge **has occurred**." The Board's phrasing here is quite telling.

Staff was clearly tasked with a very tall order if it were to approve an MRP and any additional THPs. Staff could not approve an MRP or additional THPs unless "there is no sediment discharged", to quote the Executive Officer. However, that absolute threshold has clearly been arbitrarily dropped to an ill-defined and ambiguous standard. In a presentation to the Board on September 28th, Staff Senior Associate Engineering Geologist Mark Neely described this new, lesser, and arbitrary standard this way:

"Palco has... a list of all the THPs in the watershed that they would ideally like to see enrolled. We asked them to put them in order of risk and, um... kind of take it to the next step and what level of further characterization would be needed to get to, to ensure our staff that any operations out there would have as close to a zero probability as practicable of no landslide discharge."¹²

Clearly, "as close a zero probability as practicable" is simply not zero. The staff's goal is obviously inconsistent with the goal of the Board, and does not conform with the Board's motion.

Approval of this MRP was done without any CEQA review.

This permit was written *after* approval of a substantially different motion by the Board. No CEQA review was done on this permit. Effectively, these so-called 'Tier 2' enrollments are an entirely new type of WDR that was invented by staff, which was not subject to any review by the Board or the public, and was not subject to any review under CEQA. The Executive Officer has taken it upon herself to shoulder a discretionary power which is reserved for the Board, and reducing it down to an administrative action without Board or CEQA review.

Issues very similar to those contained herein were raised previously in SWRCB/OCC files A-1683 and A-1692¹³. That petition concerned discretionary mitigations which were added to a WDR (in

¹² Mark Neely, September 28th, discussion of Item 7; *Update on Pacific Lumber Company's WWDRs*.

¹³ Humboldt Watershed Council, Environmental Protection Information Center and Sierra Club, Petitioners, In the Matter Re: Appeal for Immediate Emergency Stay of Action by California Regional Water Quality Control Board – North Coast Region, on March 16, 2005, regarding permitting of General Waste Discharge Requirements for Pacific Lumber Company timber operations in Freshwater and Elk River watersheds, Humboldt County.

that case, the General WDR) by staff after the GWDR's CEQA review and approval. Those added mitigations were not included in the GWDR at the time of review and approval, and thus had not been subject to proper review under CEQA. The GWDR was specifically self-proscribed in these same two watersheds (Freshwater Creek and Elk River) due to their cumulative impacts, and yet its use was allowed following the discretionary addition of non-CEQA-reviewed mitigations.

In its appeal, petitioner Humboldt Watershed Council et al stated:

"The RWB's use of the GWDR (order R1-2004-0030) in watersheds where cumulative effects are present is self-proscribed under sections III.C.1, V.A.4 and V.A.5. Yet it is being justified by adding these additional mitigations which are not part of the GWDR at all. These mitigations are assumed to be a highly significant amendment to the GWDR, as they miraculously make cumulative impacts go away. Given this near-magical significance, their addition into the GWDR makes the final permit more properly recognized as an individual WDR. Individual WDRs would require public notice, circulation, and review before adoption, but that this has not happened and, therefore, the CEQA process has been improperly circumvented."

In finding in favor of petitioner HWC et al, the State Water Resources Control Board Order WQ 2005-0009,

"We agree with Petitioners' contentions. Water Code section 13223 sets forth what can and cannot be delegated by a regional water board to its Executive Officer. The issuance of waste discharge requirements is specifically made non-delegable. Under a general order, the regional water board sets up a framework for the enrollment of eligible dischargers. The order includes enrollment criteria, sufficiently specific that the decision to include a discharger under those general waste discharge requirements becomes a ministerial rather than a discretionary function¹⁰."

The footnote inserted at ¹⁰ above reads:

"¹⁰ A ministerial function involves no discretion. If an applicant satisfies certain prescribed requirements, the permit must be granted. If any of the prescribed requirements is not present, the permit must be denied. Mitigation measures do not change the situation."

The Regional Board did not provide any "enrollment criteria" or "certain prescribed requirements" for the Executive Officer to consider. Instead, the EO and her staff had to invent these

The State Board's order continues:

"In approving the enrollment of some of PALCO's THPs under the General Order, the North Coast Water Board conceded that these THPs did not meet all of the standards, but justified its efforts by pointing to supplemental mitigation measures that were being imposed on PALCO as a condition of the enrollments. No CEQA analysis was done to determine whether allowing the enrollment of those particular plans under the General Order would cause a significant environmental impact or whether the mitigation would be sufficient to lessen such an impact to acceptable levels. The CEQA document, as approved by the North Coast Water Board, does not support the motions adopted by the Board in November and March nor does it address the potential impacts from the logging under these THPs. In directing the Executive Officer to enroll those THPs, the North Coast Water Board violated CEQA."

This is remarkably similar to what is happening here. Clearly, the action taken by the Executive Officer in the current case cannot qualify as a ministerial function, as it required significant discretion. The draft WDR was subjected to nearly a full year of vigorous CEQA review and

circulation, and was approved intact. The Board did not provide any 'certain prescribed requirements' for the Executive Officer to consider. The Executive Officer and her staff have taken it upon themselves to liberally re-interpret the words of the Board to allow for an additional 'discretionary' class of WDRs, now being blithely referred to simply as "Tier 2". The terms for this new class of WDR were never subjected to any kind of CEQA review whatsoever. In fact, the Board even stated its doubt and skepticism that such mitigations were possible, noting in their resolution for the approved WDRs:

"71a: The Regional Water Board is receptive to the possibility that the Discharger's ingenuity may produce a method of performing more extensive harvesting activities and still achieving compliance with the sediment target. Unfortunately, the Regional Water Board is unaware of a monitoring method that will enable compliance to be determined on an ongoing basis."¹⁴

Despite this caution, the Executive Officer chose to direct her staff to develop these additional mitigations *post-CEQA* and allow additional enrollments. The approved WWDRs and their attachments for these two watersheds run to over 400 pages in length, including findings resolutions, 2 technical reports, initial studies, monitoring programs, and the permits themselves, yet nowhere in those 400 pages will one find the any discussion of "Tier 2" enrollments under any name. It would be more accurate to classify the WWDR enrollments into Board-approved, or "ministerial" acres and non-Board approved, or "discretionary" acres. There simply was no review of these completely discretionary permits.

Approval of this MRP ignores cumulative impacts.

The core issue in these watersheds these many years has been the need to address cumulative impacts. The massive administrative record for these watersheds is full of evidence that the THP-by-THP approach to reviewing and permitting simply cannot address cumulative impacts. The whole purpose of the Watershed-wide Waste Discharge Requirements was to address cumulative impacts on the watershed scale. The MRP and subsequent non-Board-approved THP enrollments amount to a return to this one-by-one approach. There is no accounting of the total impact of these additional acres, of how much sediment may be generated before any is detected by after-the-fact monitoring, of how much additional sediment will be generated by roads, crossings, and surface erosion, or of any other cumulative impact.

On October 26th, the Humboldt Watershed Council was invited to meet with RWB staff in Fortuna to hear a presentation on the staff's MRP. The information presented did nothing to change the Humboldt Watershed Council's belief that the MRP and any enrollments are invalid and contrary to the direct wording and intent of the Regional Board. Instead the presentation left attendees quite shocked that such a meaningless program could be approved in direct contradiction to the administrative record for these watersheds

There is absolutely nothing included in the MRP which is new or different from what has been done in the past, and yet somehow this same failed cookbook of harvesting methods is suddenly expected to yield absolutely no sediment. Clearcutting, tractors, ground-based equipment, dragging logs, equipment in WLPZs, and hauling have all been implicated in creating the existing cumulative impacts in these watersheds. It simply defies logic and the administrative record to expect that enrollments under this MRP will not simply make a bad situation worse. Staff's expectation that the same harvesting methods which created the current cumulative impacts will magically produce no sediment brings to mind a quote by Albert Einstein: *"The definition of insanity is doing the same thing over and over again and expecting a different result."*

¹⁴ Findings Resolution for Freshwater Creek WWDR, No. R1-2006-0040

The WWDRs define Timber Harvesting Plan Activities thus:

“F. “Timber Harvesting Plan Activities” or “THP Activities” means the cutting or removal of both timber or other solid wood forest products from timberland for commercial purposes, together with all the work incidental thereto, including but not limited to, construction, reconstruction, use and maintenance of roads, fuel breaks, firebreaks, watercourse crossings, landings, skid trails, beds for the falling of trees, fire hazard abatement, and site preparation.”¹⁵

On February 27th, 2003, the Board adopted the following motion in response to a petition filed by the Environmental Protection Information Center and Humboldt Watershed Council:

“In denying the request for enforcement the Board wishes to make clear that it is the view of the Board that the commencement of activities under a Timber Harvest Plan, including the falling of timber, without coverage under a waiver or waste discharge requirements, constitutes the initiation of a discharge under Section 13264 that could lead to enforcement under Section 13265.”¹⁶

This MRP has now succeeding in addressing only a very narrowly-defined subset of sediment from only shallow-seated landslides as defined by the discharger. The many other sources of sediment which will categorically be generated in pursuit of these additional acres are simply not addressed by this permit, making a mockery of any discussion of cumulative effects.

Approval of this MRP is irreconcilable with the Board’s stated requirement to allow zero sediment discharge beyond 125% of background and will categorically result in a significant increase in sediment delivery to Freshwater Creek and Elk River.

The staff-edited and non-Board-approved version of the WWDR is blindly focused only upon sediment generated from landslides. This not only ignores the direct wording of the Board’s May 8th, 2006 motion, but it also ignores common logic and all available science. Pacific Lumber Company’s own Freshwater Creek Watershed Analysis states that the primary sediment source in Freshwater is sediment from their logging roads. This sediment is not generated by landsliding, but rather by log trucks and heavy equipment traffic, which account for 88 percent of all harvest-related sediment delivered to Freshwater Creek.

Significantly, whereas the 12% of sediment generated by landslides only occurs when something ‘goes wrong,’ the 88% of sediment generated from roads, crossings, landings, and surface erosion occurs *even if everything goes right!* Even if logging operations under this “Tier 2” document do not result in a single landslide, these operations will still result in dumping sediment into Freshwater Creek that is up to one and one-half times more than the total already allowed by the Freshwater WWDRs sediment cap of 144 acres. ($238 \times 0.88 = 209$, $209/144 = 1.45$)

Thus, the allowance of any timber harvest beyond those in the original WWDR approvals, without a plan to positively prevent the generation of sediment from non-landslide sources will ultimately guarantee that the 125% limit will be exceeded by a wide margin. For this reason, this MRP is absolutely irreconcilable with the Board’s 125% limit.

Approval of this MRP was done without public participation, and denied effected residents of their right to have meaningful input into the process.

¹⁵ Freshwater Creek WWDRs, R1-2006-0041, Section X: DEFINITIONS, Paragraph F (page 19)

¹⁶ Regional Water Board February 27, 2003 Adopted Motions Item 16

The long-standing issues in Freshwater Creek and Elk River have been marked by a very high-level of citizen involvement over the last 10 years. The Humboldt Watershed Council originated from the efforts of community members in Elk River and Freshwater, and so has a deep and long-standing interest in any and all ongoing aspects of the issue.

Cletus Isbell, a Freshwater resident, is among the many residents who have tried to keep themselves apprised of any permitting developments in these watersheds. Mr. Isbell had been in contact with Mr. Mark Neely of the NCRWQCB staff regarding these developing permits, and had sought to obtain a draft of the permit at the earliest opportunity.

A chain of e-mails between Mr. Isbell and Mr. Neely is attached. Those e-mails show that Mr. Isbell had requested to receive a copy of the draft MRP on September 28th, before it was approved. A follow up e-mail from Mr. Neely later that same day promised *"The monitoring plan will be finalized tomorrow, and I will send it to you then. We have a little catch-up to do to get out to the public what we have been doing. We'll post some stuff on the web too."*

The MRP was signed and approved by the Executive Officer on Friday, September 29th, and yet Mr. Isbell and others who had requested the document did not receive it until 4:52pm on Monday, October 2nd, well after the plan was approved and in Pacific Lumber Company's hands. Obviously, the only time that public input can be meaningful is before the permit is approved, not 4 days afterwards. This uneven handling of interested parties violates the rights of the effected public to play an active and meaningful role in the development of permits which will have a profound effect on their health, safety, property, and quality of life.

Additionally, the promise by Mr. Neely to *"get out to the public what we have been doing"* rings false, since as of this writing there is absolutely no information available on the Regional Water Board's website regarding these permits, not even the MRP itself. There is also no documentation available which even begins to address, explain, or justify the flawed and improper 'interpretation' of the Board's May 8th, 2006 motion. It must also be noted that, following upon Mr. Neely's promise to provide information to Mr. Isbell, Mr. Neely promptly left town for three weeks.

(5) The manner in which the petitioner is aggrieved.

Past history, the administrative record, and repeated scientific analyses have all established that PL's excessive rate of harvest in these watersheds has been responsible for greatly increased flooding, which has caused extensive property damage and threatened public health and safety. It has been established as fact that the past and current rates of harvest in these watersheds contribute sediment delivery to the watercourses, which then settles out in the lower reaches. It has been further established that this sediment delivery due to timber harvesting has reduced the channel capacity in Elk River by over 60% since 1967¹⁷, meaning that the channel is no longer capable of holding the amount of water that it once did. This forces typical storm flows out of the stream channel, invading the private property of residents.

This invasion of private property has caused, and continues to cause, damage to homes, foundations, driveways, fences, septic systems, wells, furniture, vehicles, livestock, etc. It has also forced hundreds of residents to be held against their will by floodwaters which prohibit them from entering or exiting their property, keeping families apart for days at a time, or forcing them to assume great personal risks to their health and safety in crossing floodwaters.

¹⁷ See Preliminary Flood Assessment of Lower Elk River, Rose Patenaude, P.E, NCRWQCB

It has been well established as fact that PL's practices have harmed the residents of these watersheds. It has also been well established as fact that the Forest Practice Rules, PL's HCP, and other regulatory measures currently being used, including the GWDR, are all inadequate to protect these residents from further harm. Therefore, the Board's direction, and the Executive Officer's action pursuant to that motion, to permit continued operations under those same inadequate regulatory measures will do direct harm to the residents of these watersheds, whose interests the Humboldt Watershed Council represents.

The manner and mechanism by which the petitioner is aggrieved has been laid out in great detail in the extensive findings for these WWDRs (excerpts are from the Findings Resolution for Freshwater Creek. The Elk River resolution is nearly identical):

1. The Pacific Lumber Company, the Scotia Pacific Company LLC, and Salmon Creek Corporation, all subsidiaries of MAXXAM, Inc., (hereinafter collectively referred to as the "Discharger") own approximately 220,000 acres. The Discharger owns and/or conducts Timber Harvesting Plan Activities on approximately 15,520 acres of the 19,892-acre Freshwater Creek watershed, which is tributary to Humboldt Bay and southeast of Eureka. The Discharger owns approximately 78% of the total watershed area.

2. The Discharger conducts timber harvesting, forestry management, road construction and maintenance, and related activities on the lands in the Freshwater Creek watershed within its ownership.

3. These activities, in general, result in impacts including increased storm water runoff and discharges of sediment, including discharges resulting from the generation of landslides.

18. On December 16, 1997, representatives of CDF, California Department of Fish and Game, California Division of Mines and Geology (now known as the California Geologic Survey), and Regional Water Board staff² reached consensus that the Freshwater Creek watershed had significant adverse cumulative watershed impacts, with timber harvesting a contributing factor.

19. Sediment deliveries to Freshwater Creek have increased in response to accelerated Timber Harvesting Plan Activities, resulting in impacts to water quality conditions documented by residents and Regional Water Board staff:

21. The Freshwater Creek watershed is listed as an impaired water body under Section 303(d) of the Clean Water Act due to sedimentation/siltation. Water quality problems cited under the listing include: sedimentation, threat of sedimentation, impaired irrigation water quality, impaired domestic supply water quality, impaired spawning habitat, increased rate and depth of flooding due to sediment, and property damage.

39. Frequent flooding limits the residents' ingress and egress to their property. In particular, the U.S. Army Corps of Engineers (1975), in their report on flooding in Freshwater Creek, described several potential hazards: people can become trapped in their homes or vehicles; the force of the floodwaters and debris deposits can rupture waterlines and risk contamination of domestic water supplies; and isolation of areas by floodwater creates hazards in terms of medical, fire, or law enforcement emergencies. Property damage includes fences being knocked down during floods, loss of agricultural productivity through deposition of silt on crops, threats to septic systems, loss of water supplies by filling of pools with sediment, and wear and failure of pumps and other mechanical devices. When floodwaters enter homes, they cause damage to floorings, furniture, walls, etc. and require residents to raise furniture and property for its protection. Cleanup after a flood event is costly and time-consuming. Residents attempt to protect their homes from floodwaters by using sandbags or by constructing walls and levees.

Due to increased risk of flooding, property values are reduced and flood insurance is difficult to obtain and expensive to maintain. Nuisance expresses itself in different forms: emotional and psychological distress of floodwaters entering a property or home, financial hardship, and anxiety. All of these effects constitute a nuisance condition.

43. Flooding in the Elk River and Freshwater Creek watersheds have reached nuisance levels. Residents downstream of the Discharger's timber harvesting activities in the Freshwater Creek watershed filed formal complaints with the Regional Water Board (and other State agencies) contending the increased magnitude (i.e. water surface elevation) and frequency of flooding in the lower portion of the two watersheds have and are continuing to significantly affect the beneficial uses of water and the public health and safety of downstream residents.

68. As discussed above in Findings 17-21, the Regional Water Board has concluded that timber harvesting activities are the dominant factor in contributing to the 303(d) sediment impairment of Elk River and Freshwater Creek. The impairment of these watersheds demonstrates that sediment has diminished water quality so severely that they no longer attain beneficial uses of water.

70. Waste discharge requirements must implement the Basin Plan. The waste discharge requirements for timber harvesting plan activities, therefore, must include a standard that, when achieved, will represent compliance with the above Basin Plan provisions. Because the adverse effect on beneficial uses from sediment load is due to the condition of the receiving water, the standard has been expressed in the waste discharge requirements as a receiving water limitation.¹⁸

Additionally, Humboldt Watershed Council was the impetus behind the efforts to require Watershed-Wide Waste Discharge Requirements for these watersheds. HWC has been a party to virtually every petition, appeal, or lawsuit regarding these ongoing issues since at least 1997, and thus has a significant vested interest in ensuring that these WWDRs, which are the fruits of our years of labors, are adequate and are not arbitrarily undermined by staff.

(6) The specific action by the state or regional board which petitioner requests:

Petitioner HWC is requesting that the State Water Board rescind all current and pending enrollments in the so-called "Tier 2" plan and direct the Regional Board staff to make the final version of the approved WWDR conform to the Regional Board's motion, as required by that motion. Additionally, petitioner is requesting that any and all harvested acreage above the level allowed by the WWDR as approved be counted against allowances for the next calendar year.

(7) A statement of points and authorities in support of legal issues raised in the petition, including citations to documents or the transcript of the regional board hearing:

The points and authorities to support the legal issues raised herein have all been discussed in detail under Section 4, above. Documents and transcripts referenced have all been footnoted.

¹⁸ Findings Resolution for Freshwater Creek WWDR, No. R1-2006-0040

Applicable code sections which are violated by the actions of the Board and the EO include, but are not limited to:

- Government Code Section 65040.12
- Public Resources Code Section 72000
- Water Quality Control Plan For The North Coast Region (Basin Plan), June 28, 2001
- Multiple sections of the Porter-Cologne Clean Water Act, including, but not limited to Sections 13050(m), 13301, 13304, 13308, 13350, 13351, 13376, 13377, 13381, 13382, 13384, 13387
- Federal Water Pollution Control Act (33 U.S.C. Sec. 1251 et seq.)
- SWRCB Water Quality Enforcement Policy, February 19, 2002

(8) A statement that the petition has been sent to the appropriate regional board and to the discharger, if not the petitioner:

This petition has been sent concurrently to the following persons via E-Mail:

Theodore A. Cobb, Esq.
State Water Resources Control Board
1001 I Street, 22nd Floor [95814]
P.O. Box 100
Sacramento, CA 95812-0100
Tel: (916) 341-5171
Fax: (916) 341-5199
Tcobb@waterboards.ca.gov

Frank Shaw Bacik (on behalf of Palco)
Pacific Lumber Company
125 Main Street
Scotia, CA 95565
Phone 707-764-4392
Fax 707-764-4118
fbacik@sbcglobal.net

Samantha Olsen, Esq.
c/o North Coast Regional Water Quality Control
Board
5550 Skylane Boulevard, Suite A
Santa Rosa, CA 95403
Tel: (707) 576-2550
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Solsen@waterboards.ca.gov

Frank Shaw Bacik (on behalf of "Owners")
Carter, Behnke, Oglesby & Bacik
169 Mason Street, Suite 300
Post Office Box 720
Ukiah, California 95482-0720
Tel: (707) 462-6694
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Catherine Kuhlman
Executive Officer
North Coast Regional Water Quality Control Board
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Tel: (707) 576-2220
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KuhlC@rb1.swrcb.ca.gov

Christopher J. Carr, Esq.
Stoel Rives, LLP
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San Francisco, CA 94104
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wmsloan@stoel.com

(9) A statement that the substantive issues or objections raised in the petition were raised before the regional board, or an explanation of why the petitioner was not required or was unable to raise these substantive issues or objections before the regional board.

This petition is not a challenge against the WWDRs as *adopted*, but rather against the staff's improper re-interpretation and implementation of the WWDR. Staff's flawed action is the result of

a dramatic re-wording of the Board's motion which does not conform to that motion. The Board's wording of its motion was quite clear in stating "*That in the event of any inconsistencies, the WWDRs and Resolutions be conformed to the motion.*"¹⁹ Clearly the reinterpretation of the Board's motion simply does not conform. This non-conforming version of the permit was never presented to the Board for approval, but the minutes of the May 8th meeting, containing the language above, were submitted and approved on June 29th. The approved and adopted version of the permit thus exists in the Board's motion and not in any subsequently-penned staff documents.

Given this, petitioner had no reason to appeal the WWDR *as approved by the Board*. What petitioner is appealing here is the MRP which is based on a flawed, inconsistent and non-conforming version of the WWDR *which was never submitted to the Board for approval*. Clearly petitioner could not logically be expected to appeal an action by the Executive Officer prior to that action being taken.

The issues raised herein have since been raised to the Regional Board in a Petition for Reconsideration²⁰, and a hearing on that petition has been scheduled for November 29th. However, action by the State Board is still necessary because the Regional Board is not expected to have a quorum for the hearing on the 29th, and thus petitioner's rights to redress through that avenue cannot be assured. Without a quorum the Board would not be able to provide any direction to the EO.

The Regional Water Board, in a response to HWC's Petition for Reconsideration, has claimed that this petition amounts to an "*untimely collateral attack on the WWDR itself.*"²¹ This is simply not true. By the words of the Board cited above, the full essence of the Board's changes to the WWDR must be found in the approval motion, and not in the flawed and incorrect wording inserted by staff into the final document. That final document was never submitted to the Board for approval, and thus cannot logically have been approved by them.

Additionally, it would be unrealistically burdensome to the petitioner and members of the public if every document had to be parsed word for word when the Board had made such a clear and unequivocal statement "*That in the event of any inconsistencies, the WWDRs and Resolutions be conformed to the motion.*" It would be even more burdensome if parties were forced to appeal clearly-stated and understood words simply on the off chance that they may be falsely and incorrectly re-written at a later date. To require that kind of skeptical approach would force petitioner and indeed any party to have to appeal literally every action by any Board, simply because clearly heard words cannot be relied upon.

Lastly, petitioner HWC chose to act in good faith that the clear words of the Board were worth something, and could be relied upon. Petitioner had sincerely hoped that the clearly-stated action by the Regional Board on May 8th would finally put an end to this ongoing issue and create a permit that both sides could ultimately live with, if not embrace. Petitioner's decision to not appeal the Board's clearly understood words was an expression of that hope and our desire to finally put an end to the constant fighting which has characterized this issue for nearly 10 years. Petitioner sincerely hopes that the State Board would not want to send the message that HWC must forever-more appeal every action by the Regional Board until all of us are in our graves.

Request for Stay

¹⁹ Minutes of the May 8th, 2006 NCRWQCB meeting, in document titled *May 8 Minutes-ejl-eks*

²⁰ Humboldt Watershed Council Petition For Reconsideration Of Approval Of Monitoring And Reporting Program, Order R1-2006-0103

²¹ Luis G. Rivera, Request for Rejection of HWC's Petition, October 13, 2006

Failure to immediately stay the Executive Officer's action will directly harm the health, safety, property, and liberty of the residents of these watersheds, whose interests the Petitioners represent. Prior to the Executive Officer's action, the RWB had approved Watershed-wide Waste Discharge Requirements which imposed meaningful limits on PL's logging activity in these watersheds. These limits were directly based upon well-established science in the administrative record, and were designed to give Pacific Lumber the maximum possible timber harvest in these watersheds which would still allow meaningful recovery and, thus, relief for the residents. The pre-existing regulatory condition was therefore a quantifiable and meaningful trajectory towards recovery. By capriciously overturning the staff's prior actions, the Board's action slows this recovery so as to render it meaningless. Therefore, the EO's action is not merely a failure to relieve existing and ongoing harm, but rather actively and knowingly subjects the residents to new harm which would otherwise not exist.

The granting of a stay would not cause harm to Pacific Lumber. The economic impacts from the level of harvest allowed without the additional non-Board-approved acres had been fully considered by the Board in its findings resolution. At 42 pages in length, the Findings Resolution includes a comprehensive discussion of the mechanism of harm to the downstream residents, and a full discussion of the economics of the issue. In its thorough consideration of this issue, the Board determined that the balance of harms at the level of harvest prescribed in the WDR was reasonable. The discussion of economic considerations begins at paragraphs 105 and culminates with paragraph 112, which reads:

*112. The Regional Water Board has considered the testimony, evidence, and other available information on the economic impacts implicated by discharges of sediment, including financial burdens related to sediment discharges as borne by downstream landowners and residents and the larger community, the impairment of beneficial uses, including anadromous fisheries, and the cost of compliance with the watershed-wide WDRs. The Regional Water Board finds that the costs of compliance are reasonable under the circumstances.*²²

The granting of this stay would not reduce the discharger's level of operations below the level permitted by the Board-approved WWDR, and thus the balance of harms has already been considered to be reasonable.

Failure to grant the stay, on the other hand, will upset this balance and cause direct harm to the residents of the watersheds. If the balance was considered reasonable at the level permitted by the Board, then the improper discretionary approval of further acreage must tip the balance against the residents. The balance of harm, thus, is in favor of granting an immediate stay.

Petitioners recognize the burden of proof is upon them to show the balance of harms favors the granting of the stay. While petitioners believe that the weight of evidence overwhelmingly supports granting the stay, we also recognize that the Board has the authority to grant the stay of its own volition, regardless of the balancing defined in Section 2053(a). Subsection (b) states:

Nothing in subsection (a) shall preclude the state board from issuing a stay of the effect of an action of a regional board, after hearing, upon its own motion. The requirement of a declaration under penalty of perjury may be waived by the board in case of an emergency.

Subsection (b) allows that merits of the case may be so overwhelming that it is necessary and prudent to stay the action regardless of the question of harm. In this case, the Executive Officer's action is so clearly arbitrary and in such direct conflict with the clearly stated wording of the Board that it amounts to an egregious violation of the public interest which simply must not be allowed to stand.

²² Findings Resolution for Freshwater Creek WWDR, No. R1-2006-0040

(1) There will be substantial harm to the Residents and to the Public Interest if a stay is not granted

Failure to immediately stay the Executive Officer's action will directly harm the health, safety, property, and liberty of the residents of these watersheds, whose interests the Petitioner HWC represent.

Further, the timeframe for this stay must be immediate, as any delay will certainly render the damages a moot point. PL's operations under these permits are likely to be completed at an accelerated rate, and in a very short time, such that the harm these operations will trigger will be set in motion immediately. Thus, any action by the SWRCB other than an immediate emergency stay would be rendered moot by the falling of trees.

It has been well established as fact, and accepted as such by the Regional Board, that PL's practices have harmed the residents of these watersheds. The Findings Resolution for the WWDRs is a testimony to the impacts in these watersheds, and serves as an indictment of the Pacific Lumber Company's logging activities in these watersheds over the past 20 years. The mechanism of harm has been laid out in detail in Section 5 of this petition, *"The manner in which the petitioner is aggrieved."* That section specifically cites paragraphs 1, 2, 3, 18, 19, 21, 39, 43, 68 and 70 of the Findings Resolution. Those findings and the record upon which they are based are so substantial that they should not require repeating.

Though the above sections detail the physical mechanism of harm, the economics of that harm are weighed in paragraphs 105 through 112 of the Findings Resolution, titled "Economic Considerations." Paragraph 107 reads:

"107. Costs of compliance with the WWDRs were evaluated, elsewhere, chiefly in a September 2, 2005 report entitled "Economic Considerations Associated with the Regulation of PALCO's Timber-Harvest-Related Discharges in Elk River and Freshwater Creek Watersheds" ("Economic Report").⁵ The 17-page Economic Report addresses economic considerations from both a macroscopic and microscopic perspective. Initially, the report explains that, on a regional scale, the WWDRs could conceivably have many positive economic effects. These include reductions in losses in many areas: commercial and non-commercial fisheries; costs associated with sediment source abatement activities such as road repairs and upgrades; landslide stabilization and remediation; damage to homes and disruption of life and livelihood caused by flooding; damage to roads and bridges from flooding; dredging of Humboldt Bay as well as upstream problem flooding areas; adverse effects on recreational uses; and impacts to and the costs of replacing domestic and agricultural water supplies.²³"

In considering its findings, the Regional Board fully considered the balance of harms and determined that the balance was fair and reasonable at the level of operations being approved. The many "positive economic effects" of the WWDR as approved are lost or reduced by the approval of additional harvest acreage, and harvest-related impacts, under the MRP. In approving the MRP and additional timber harvest activity, the Executive Officer thus tipped the balance of harm to unfairly favor the discharger at the expense of the health and safety, property, and quality of life of the effected residents.

²³ Findings Resolution for Freshwater Creek WWDR, No. R1-2006-0040

(2) There will be no substantial harm to the discharger or to the public interest if a stay is granted

While it is certainly true that a lesser level of harvest carries with it a lesser level of income, it must be recognized that this is universally true, regardless of the amount of harvest in question. Simple failure to realize a desired or anticipated level of profit is not economic harm. To allow otherwise would be to determine that the public interest must never infringe upon the desire to maximize profit at any expense.

In this case, the status quo is the level of harvest which was approved as part of the WWDR on May 8th. The Board fully considered economics before making its decision, and found that the level permitted was a reasonable balance of harms. This request for stay does nothing more than ask that that level be adhered to. There thus can be no harm.

Again, the findings resolution has already served as the most thorough discussion of the balance of harms, containing through references to economic discussions of this issue. Paragraphs 105 through 112 of the Findings Resolution, titled "Economic Considerations," detail the lack of harm to the discharger of the WWDR as approved:

105. Although Water Code section 13241 directs the Regional Water Board to take into account "economic considerations," it does not prescribe a particular manner for doing so. The method of evaluating economic considerations is effectively within the discretion of the Regional Water Board to determine. (City of Arcadia v. State Water Resources Control Board (2006) 135 Cal.App.4th 1392, 1415.) It is sufficient to satisfy the command of section 13241 if the Regional Water Board has considered the "costs of compliance" with waste discharge requirements. (City of Burbank v. State Water Resources Control Board (2005) 35 Cal.4th 613, 625; see also City of Arcadia, supra, 135 Cal.App.4th at pp. 1415-1419 [upholding trash TMDL's discussion of compliance costs]; Rancho Cucamonga, supra, 135 Cal.App.4th 1377, 1386 [requirement demands only a discussion of the compliance costs].)

106. The costs of compliance were discussed at the April 24-25, 2006 hearing. On behalf of the Discharger, Dr. Barrett asserted that the decrease in harvests incurred by the company as a consequence of complying with the WWDRs would result in a loss of revenue and layoffs.

107. Costs of compliance with the WWDRs were evaluated, elsewhere, chiefly in a September 2, 2005 report entitled "Economic Considerations Associated with the Regulation of PALCO's Timber-Harvest-Related Discharges in Elk River and Freshwater Creek Watersheds" ("Economic Report").⁵ The 17-page Economic Report addresses economic considerations from both a macroscopic and microscopic perspective. Initially, the report explains that, on a regional scale, the WWDRs could conceivably have many positive economic effects. These include reductions in losses in many areas: commercial and non-commercial fisheries; costs associated with sediment source abatement activities such as road repairs and upgrades; landslide stabilization and remediation; damage to homes and disruption of life and livelihood caused by flooding; damage to roads and bridges from flooding; dredging of Humboldt Bay as well as upstream problem flooding areas; adverse effects on recreational uses; and impacts to and the costs of replacing domestic and agricultural water supplies.

108. The Economic Report also documents negative costs associated with the WWDRs. It mentions that the Discharger has asserted that the loss of ability to harvest one Timber Harvesting Plan is equal to a cost of \$1.25 million in net revenue. The Report opines that

the claim mischaracterizes the net revenue as a “loss.” A true loss in the agricultural sector would occur, for instance, if a severe frost ruins a field of a given crop rendering it permanently unmarketable. In the logging sector, when a harvest is curtailed, the trees do not vanish; rather they continue to grow and increase in value. They are therefore available for harvest and sale at a later time. Accordingly, rather than a “loss,” the more appropriate term for this is “deferred income.”

109. On grounds that the Discharger has not adequately documented claims of negative costs, the report presents the analysis of costs to the Discharger derived independently from the company’s Securities and Exchange Commission filings, company commissioned reports and bond offering documents. The report estimates that while the WWDRs would curtail harvesting, the area affected amounts to a very small portion of harvest by the company overall. The report concludes that company management actions, chiefly the decision to agree to high interest payments, are responsible for the company’s tenuous financial position. Thus, the Report determines that these decisions far outweigh any impact from deferral of income caused by WWDR-related harvest reductions.

110. Additionally, there will be foreseeable short-term effects on “downstream” economics, i.e., the number of jobs available may be reduced due to the short-term reduction in log availability and related local economic effects. As observed in the Economic Report, however, the Discharger’s choice of a boom and bust business model will inevitably result in layoffs as an inherent function of that plan, as set out in the Discharger’s own documents. Moreover, one effect of a slowdown in cut-rate will be to preserve some of these jobs for the longer term. This deferral in some harvesting will therefore likely result in some short-term job losses while deferring some layoffs to a later date. At the larger level, any threats to the ultimate viability of the company appear to be a function of the Discharger’s chosen business model and inherent risks embedded therein.

111. Supplementing the Economic Report are additional documents, including one authored by the Discharger, a response by Mr. Michael Gjerde, and a summary of Scotia Pacific Financial Results.

112. The Regional Water Board has considered the testimony, evidence, and other available information on the economic impacts implicated by discharges of sediment, including financial burdens related to sediment discharges as borne by downstream landowners and residents and the larger community, the impairment of beneficial uses, including anadromous fisheries, and the cost of compliance with the watershed-wide WDRs. The Regional Water Board finds that the costs of compliance are reasonable under the circumstances.²⁴

As stated previously above, the balance of harms at the level of timber harvest activity prescribed by the WWDR as *approved* was fully weighed by the Board, and found to be an acceptable balance at that level. Adding non-Board-approved acreage upsets that balance.

(3) The Regional Board’s Action Raises Substantial Questions of Law on Which Petitioners are Likely to Prevail

²⁴ Findings Resolution for Freshwater Creek WWDR, No. R1-2006-0040

The facts raised in this petition clearly demonstrate that Petitioner must prevail. It is simply inarguable that the language found in the MRP and in the staff's improperly-edited version of the WWDR simply does not "conform to the motion" as was clearly and unequivocally directed by the Board. Staff arbitrarily inserted wording which was never voiced by the Board, and changed the significant phrase "*to prove no sediment discharges **are occurring***" into "*to prove that no discharge **has occurred***." There is no explanation for this arbitrary and capricious rewriting of the Board's words, which substantially changes the meaning of those words.

Similarly, there is no accounting or justification for the staff's editorial 're-interpretation' of the Board's wording from "*the board adopts a zero (0) sediment discharge level,*" into "*zero discharge of sediment from harvest –related landslides.*" Clearly, the staff did not conform the permit to the motion, despite being directly instructed to do so by the Board.

People in the room that day heard what was said, and had that corroborated by multiple transcripts and by and the minutes. The approval of an after-the-fact monitoring plan which looks only for sediment from landslides is a gross violation of what any witness to the Board's motion would reasonably have understood.

These facts are simply inarguable, and Petitioner must prevail. Additionally, Petitioner has previously prevailed at the State Board on the CEQA issues raised herein, with the State Board ruling that "*The issuance of waste discharge requirements is specifically made non-delegable.*" Petitioner reasonably expects to prevail on these counts, as well as the other raised herein.

This Petition is supported by the facts and issues herein, and the supporting documents. The Executive Officer's actions clearly violate both the letter and intent of the Board's motion of May 8th, and violate CEQA. These actions do not conform with the direct stated words of the Board, and were taken outside of and in direct contradiction to the Board's guidance, making them an assumption of discretionary powers not legally granted to the Executive Officer. Additional documents and transcripts have also been provided.

Conclusion

The Humboldt Watershed Council petitions for appeal and immediate stay of the improper action by the Executive Officer of the North Coast Regional Water Quality Control Board. Petitioner HWC and the public interest will be substantially and irreparably harmed by the Executive Officer's improper discretionary act.

Approval of this MRP violates both the letter and intent of the North Coast Regional Water Board's May 8th, 2006 motion and its findings, is inconsistent with the Board's previous findings on this issue, is irreconcilable with the Board's stated requirement to allow zero sediment discharge beyond 125% of background, will categorically result in a significant increase in sediment delivery to Freshwater Creek, will subject downstream landowners to further harm, was done without any CEQA review, ignores cumulative impacts, and was done without consideration for or involvement of effected residents who had specifically asked to be apprised of any developing permit.

The State Water Resources Control Board has no acceptable recourse other than to immediately stay these actions taken by the Regional Board's Executive Officer, and to rescind all current and pending enrollments in the so-called "Tier 2" plan and direct the Regional Board staff to make the final version of the approved WWDR conform to the Regional Board's motion, as required by that motion. To not do so would directly harm the health, safety, and property of the residents of these watersheds, whose interests the Humboldt Watershed Council represents.

I hereby declare that the foregoing is true and correct to the best of my knowledge.

DATED: October 30, 2006 in Eureka, California.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mark Lovelace", written over a horizontal line.

Mark Lovelace
Humboldt Watershed Council